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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

EBONEY HALL,

Defendant and Appellant.

B214874

(Los Angeles County
Super. Ct. No. BA342472)

APPEAL from a judgment of the Superior Court of Los Angeles County, James D. Otto, Judge. Affirmed.

Lenore De Vita, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and E. Carlos Dominguez, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Eboney Hall appeals from the judgment entered following a jury trial that resulted in her conviction for robbery. Hall was sentenced to a term of 13 years in prison. She contends the trial court prejudicially erred by failing to instruct, sua sponte, on the defense of necessity. Discerning no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

a. *People's case.*

Shortly after midnight on June 21, 2008, Jolynn Pineda was walking toward her car in Hollywood, talking on her cellular telephone, when a Ford Focus stopped nearby. Appellant Hall exited the Ford, approached Pineda, pointed a gun at her, and demanded her purse. A second man was behind Hall, and two other persons, a man and a woman, remained in the Ford. Pineda gave her purse to Hall, who walked away. Hall returned a moment later and demanded Pineda's cellular telephone. According to Pineda, during the robbery Hall seemed "very . . . sure of herself, very focused, comfortable." After taking the phone, Hall entered the Ford, which drove off.

Pineda memorized the Ford's license plate, hurried to a local bar, and had the doorman call police. Police officers quickly located the vehicle and effectuated a traffic stop. Hall and her three cohorts were inside the Ford. Pineda's purse and phone were recovered from the car. A loaded handgun was found underneath the front passenger seat where Hall had been seated. Pineda positively identified Hall as the person who had robbed her, and the three others as her companions.

b. *Defense case.*

Appellant Hall, who was 18 years old, and Ariel Linear were close friends. The women had made plans to "hang out" together on June 20, 2008. On that date, Linear drove to Hall's residence and picked her up. They then picked up William Mitchell and Mitchell's friend, Adam Lamont. Both women knew Mitchell well. Hall had never met Lamont before, and Linear was not well acquainted with him. Mitchell had the initials "HTC," for "Harlem Thirty Crip" tattooed on his left cheek. Linear and Hall knew Mitchell was a gang member, but Hall had never seen him engage in any gang-related

behavior. When the men entered the car, Mitchell told the women that Lamont was “his homeboy from his hood,” with the moniker “Ghost.” The women were not gang members.

The group spent the afternoon and evening of June 20, 2008, together. During this period they shopped, dined, and drove around. Shortly after midnight, when the group was driving in Hollywood, Lamont told Linear to stop the car. He pulled out a gun and placed it on the seat between Linear and Hall. Lamont then told Hall to “get out and rob the girl that was walking down the street.” Lamont and Hall exited the car, and Lamont gave her the gun. He stated that he “knew where [she] lived; he knew where [she hung out]; he knew where [she would] be at” Hall had never seen or held a gun. Frightened, Hall robbed Pineda of her purse. Lamont told her to obtain the victim’s cellular telephone as well, and Hall complied. Hall then returned to the car and attempted to return the gun to Lamont. He refused to take it, however, and she placed it under her seat. Neither Hall nor Linear had known Lamont intended to commit a robbery. Although Linear had a cellular telephone with her, she did not telephone police for help. Hall did not think of calling police.

2. Procedure.

Trial was by jury. Hall was convicted of robbery (Pen. Code, § 211). The jury also found Hall personally used a firearm during commission of the offense (Pen. Code, § 12022.53, subd. (b)). The trial court sentenced Hall to a term of 13 years in prison. It imposed a restitution fine, a suspended parole restitution fine, a court security surcharge, a crime prevention fee, and a criminal conviction assessment fee. Hall appeals.

DISCUSSION

The trial court did not err by failing to instruct on the defense of necessity; the purported error was harmless.

The trial court instructed on duress with CALCRIM No. 3402. That instruction told the jury, inter alia, that Hall acted under duress if, because of threat or menace, she reasonably believed that her own or another’s life was in immediate danger if she refused a demand or request to commit the crime. The instruction further advised that the People

had the burden to prove beyond a reasonable doubt that Hall did not act under duress. Hall did not request, and the trial court did not instruct upon, the defense of necessity.¹ Hall contends this was prejudicial error, requiring reversal of her conviction.

A trial court must instruct on general principles of law that are closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case, including defenses on which the defendant relies or which are not inconsistent with the defendant's theory of the case. (*People v. Boyer* (2006) 38 Cal.4th 412, 468-469; *People v. Breverman* (1998) 19 Cal.4th 142, 148-149, 157; *People v. Salas* (2006) 37 Cal.4th 967, 982; *People v. Oropeza* (2007) 151 Cal.App.4th 73, 78.) A court is not obliged to instruct on theories that lack substantial evidentiary support. (*People v. Miceli* (2002) 104 Cal.App.4th 256, 267.) “ ‘ “ ‘Substantial evidence is evidence sufficient to “deserve consideration by the jury,” that is, evidence that a reasonable jury could find persuasive.’ ” ’ [Citation.]” (*People v. Benavides* (2005) 35 Cal.4th 69, 102; *People v. Oropeza, supra*, at p. 78.) In determining whether an instruction is required, we do not determine the credibility of the defense evidence, but only whether there was evidence which, if credited by the jury, was sufficient to raise a reasonable doubt. (*People v. Salas, supra*, at p. 982; *People v. Cole* (2007) 156 Cal.App.4th 452, 483-484.)

¹ CALCRIM No. 3403 is the standard instruction on the defense of necessity. It provides: “The defendant is not guilty of [the offense] if (he/she) acted because of legal necessity. [¶] In order to establish this defense, the defendant must prove that: [¶] 1. (He/She) acted in an emergency to prevent a significant bodily harm or evil to (himself/herself/ [or] someone else); [¶] 2. (He/She) had no adequate legal alternative; [¶] 3. The defendant's acts did not create a greater danger than the one avoided; [¶] 4. When the defendant acted, (he/she) actually believed that the act was necessary to prevent the threatened harm or evil; [¶] 5. A reasonable person would also have believed that the act was necessary under the circumstances; [¶] AND [¶] 6. The defendant did not substantially contribute to the emergency. [¶] The defendant has the burden of proving this defense by a preponderance of the evidence. This is a different standard of proof than proof beyond a reasonable doubt. To meet the burden of proof by a preponderance of the evidence, the defendant must prove that it is more likely than not that each of the six listed items is true.”

We independently review the question of whether the trial court erred by failing to instruct on defenses and lesser included offenses. (*People v. Oropeza, supra*, at p. 78; *People v. Cook* (2006) 39 Cal.4th 566, 596.)

“ ‘To justify an instruction on the defense of necessity, a defendant must present evidence sufficient to establish that [he] [or she] violated the law (1) to prevent a significant and imminent evil, (2) with no reasonable legal alternative, (3) without creating a greater danger than the one avoided, (4) with a good faith belief that the criminal act was necessary to prevent the greater harm, (5) with such belief being objectively reasonable, and (6) under circumstances in which [he] [or she] did not substantially contribute to the emergency. [Citations.]’ [Citation.]” (*People v. Galambos* (2002) 104 Cal.App.4th 1147, 1160; *People v. Miceli, supra*, 104 Cal.App.4th at p. 267; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1164-1165; *People v. Kearns* (1997) 55 Cal.App.4th 1128, 1135.)

The trial court did not err by failing to instruct on the defense of necessity because the evidence was insufficient to permit a reasonable jury to find the elements were established. (See *People v. Verlinde, supra*, 100 Cal.App.4th at p. 1165.) There was no evidence the purported danger was imminent. Lamont never pointed the gun at Hall or expressly threatened immediate harm if she failed to commit the robbery. Lamont did not use physical force against Hall to get her to commit the crime. When she committed the robbery, Hall had already exited the car, and had possession of the only gun immediately available to the parties. Lamont’s comments related to possible future retaliation if Hall did not do as he commanded, and did not constitute an emergency or imminent evil. “As a matter of public policy, self-help by lawbreaking and violence cannot be countenanced where the alleged danger is merely speculative and the lawbreaker has made no attempt to enlist law enforcement on his side. ‘[T]he defense of necessity is inappropriate where it would encourage rather than deter violence. Violence justified in the name of preempting some future, necessarily speculative threat to life is the greater, not the lesser evil.’ [Citation.]” (*People v. Miceli, supra*, 104 Cal.App.4th at p. 268; *People v. Kearns, supra*, 55 Cal.App.4th at p. 1135.)

The evidence did not readily support a finding that Hall lacked reasonable legal alternatives. “ ‘The necessity defense is very limited and depends on the lack of a legal alternative to committing the crime. It excuses criminal conduct if it is justified by a need to avoid an imminent peril and there is no time to resort to the legal authorities or such resort would be futile.’ [Citation.]” (*People v. Verlinde, supra*, 100 Cal.App.4th at p. 1164.) Here, Hall had exited the car and was in possession of a loaded firearm. She could have fled with the gun to a nearby business, as the victim did after the crime, and asked employees to call police. (See *People v. Kearns, supra*, 55 Cal.App.4th at p. 1135.)

People v. Kearns, supra, 55 Cal.App.4th 1128, is instructive. There, the defendant committed four robberies. Her defense was, inter alia, that she was forced, by threats against her life, to commit the crimes. After her conviction, she contended the trial court erred by failing to instruct on the defense of necessity. The defendant testified that she was a methamphetamine addict who had moved out of her parents’ home. Lemont Scott had raped her and repeatedly threatened and beaten her over the course of several months. On one occasion, he put a gun to her head and told her he would kill her if she did not do as he instructed. He and a confederate drove her to a convenience store, and commanded that she rob it. She complied. She attempted to run away after the robbery; however, Scott caught her. She failed to tell anyone about the incident because Scott had threatened to kill her. Due to Scott’s continued threats and physical abuse, Kearns committed three more robberies. Several witnesses testified in support of Kearns’s account. The jury acquitted Kearns of the first robbery, but convicted her of the three others. The appellate court rejected the contention that the jury should have been instructed on the defense of necessity. (*Id.* at p. 1135.) It explained that the evidence was insufficient to support such a defense. “Most notably,” Kearns failed to establish the lack of a reasonable legal alternative to committing the crimes, in that she could have asked the victims to call police rather than carrying out the robbery. (*Ibid.*)

Contrary to Hall's argument, *People v. Heath* (1989) 207 Cal.App.3d 892, does not compel a contrary result. In *Heath*, the defendant admitted committing a burglary. According to Heath, he and his drug dealer, Sodersten, and another man drove around for hours drinking and taking drugs in Sodersten's truck. Heath owed Sodersten money, and at approximately 3:00 a.m., Sodersten said Heath could commit a burglary to repay him. (*Id.* at p. 896.) Sodersten drove Heath to a residence, pointed a loaded gun at him, and threatened to kill him and throw his body into a ditch if he refused to commit the burglary. Heath walked toward the house, threw a planter through the window, observed that Sodersten and the other man were watching him, and committed the burglary. After he was in the house for approximately 15 minutes, police apprehended him. (*Id.* at pp. 896-897.)

The trial court instructed with the standard duress instruction, as well as a special instruction on "the defense of justification or duress." (*People v. Heath, supra*, 207 Cal.App.3d at p. 896.) The appellate court agreed the second instruction was erroneous in that it conflated the two doctrines. (*Id.* at p. 901.) The defense of duress, *Heath* reasoned, comes into play only when a defendant responds to an immediate and imminent danger. (*Id.* at p. 900.) The intent element of the crime is negated because the defendant has no time to formulate a course of conduct or criminal intent. (*Ibid.*) The defense of necessity, in contrast, is founded upon public policy and provides a justification for the crime, but does not negate any element of the crime. (*Id.* at p. 901.) "Unlike duress, the threatened harm is in the immediate future, which contemplates the defendant having time to balance alternative courses of conduct." (*Ibid.*) The appellate court concluded instructions on both defenses were warranted in *Heath*. The defendant "was first subject to an immediate and imminent threat to his life" when Sodersten held the loaded gun to his head in the truck. When Heath exited the car and entered the house, he was no longer subject to the same imminent harm as he had been in the truck; instead, "the threat became one in the immediate future allowing appellant an opportunity, albeit brief, to balance his options, which is the very essence of the necessity defense." (*Id.* at

p. 902.) Heath concluded that although the trial court erred by conflating the two defenses, the error was harmless. (*Id.* at pp. 901-902.)

Heath does not compel a different result here. In *Heath*, the threatening party remained on the scene of the burglary with a loaded gun, forcing compliance. Here, in contrast, the threatening party *gave the gun to Hall* to commit the robbery, mitigating against the conclusion that she was in danger in the immediate future. Because she had possession of the only gun at the crime scene, Hall's situation was unlike that of the *Heath* defendant.

Significantly, assuming *arguendo* that the trial court erred by failing to instruct on the defense of necessity, any such error was harmless under any standard (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836; see *People v. Salas, supra*, 37 Cal.4th at p. 984 [the standard of prejudice applicable to the erroneous failure to instruct on an affirmative defense is unsettled]; *People v. Williams* (2009) 176 Cal.App.4th 1521, 1530 [same].) As noted *ante*, Hall's jury *was* instructed on the defense of duress. That instruction informed jurors that Hall was not guilty if, because of threat or menace, she reasonably believed that her own or someone else's life would be in immediate danger if she refused an express or implicit demand to commit the crime.² The jury was further informed that the People had the burden of proving beyond

² That instruction provided: "The defendant is not guilty of Second Degree Robbery if she acted under duress. The defendant acted under duress if, because of threat or menace, she believed that her or someone else's life would be in immediate danger if she refused a demand or request to commit the crime. The demand or request may have been express or implied. [¶] The defendant's belief that her or someone else's life was in immediate danger must have been reasonable. When deciding whether the defendant's belief was reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in the same position as the defendant would have believed. [¶] A threat of future harm is not sufficient; the danger to life must have been immediate. [¶] The People must prove beyond a reasonable doubt that the defendant did not act under duress. If the People have not met this burden, you must find the defendant not guilty of Second Degree Robbery."

a reasonable doubt that the defendant did *not* act under duress. In contrast, because the defense of necessity is an affirmative defense (*People v. Kearns, supra*, 55 Cal.App.4th at p. 1134), a defendant has the burden of proving its elements. (See *People v. Salas, supra*, 37 Cal.4th at p. 971; *People v. Miceli, supra*, 104 Cal.App.4th at p. 267; *People v. Verlinde, supra*, 100 Cal.App.4th at p. 1165.) If the jury believed that Lamont's actions and statements constituted an immediate threat to kill or harm Hall unless she committed the robbery, the jury would have doubtless concluded she acted under duress. As the jury rejected the contention that Hall acted under duress, it would have rejected the contention that Hall acted out of necessity. (Cf. *People v. Saavedra* (2007) 156 Cal.App.4th 561 [where jury was instructed on necessity defense, it was apprised of a theory that would have supported acquittal; jury's rejection of necessity defense demonstrated beyond a reasonable doubt that it would have rejected a self-defense theory based on same facts].) Here, because the jury was instructed on the duress defense, it was apprised of a theory that would have supported acquittal had it credited Hall's testimony that she committed the robbery only because she reasonably believed there was an imminent danger to herself or another. It follows that the failure to instruct on the defense of necessity did not affect the verdict because the jury did not find Hall's claims credible. (*Id.* at p. 570.)

DISPOSITION

The judgment is affirmed.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.